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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW ROSS, et al.,
Plaintiffs,
v.
ECOLAB INC.,
Defendant.

Case No. 13-cv-5097-PJH

**ORDER RE MOTIONS FOR SUMMARY
JUDGMENT AND MOTION FOR
DECERTIFICATION**

Plaintiffs' motion for partial summary judgment, defendant's motion for summary judgment, and defendant's motion for decertification came on for hearing before this court on May 20, 2015. Plaintiffs Matthew Ross and Robert Magee ("plaintiffs") appeared through their counsel, Alejandro Gutierrez and Brian Hefelfinger. Defendant Ecolab, Inc. ("defendant" or "Ecolab") appeared through its counsel, Arch Stokes, Shirley Gauvin, Peter Maretz, and John Hunt. Having read the papers filed in conjunction with the motions and carefully considered the arguments and relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

This is a wage and hour class action centering around the alleged misclassification of employees as exempt. Plaintiffs work as "Route Sales Managers" (or "RSMs") for Ecolab, which describes itself as "the global leader in water, hygiene, and energy technologies and services." The exact job duties of the RSMs is a matter of some dispute, but the parties agree that the RSMs travel to the sites of Ecolab's customers (including restaurants and other businesses in the hospitality industry) in order to provide

1 service to their commercial dishwashers, which are leased from Ecolab. Specifically, the
2 RSMs install, repair, and otherwise maintain the dishwashers, and also sell products
3 (such as detergents, sanitizers, etc.) to the customers. Plaintiffs claim that they have
4 been misclassified as “exempt,” and thus have not received the overtime pay and meal
5 breaks to which they were entitled.

6 The suit was originally filed by plaintiff James Icard in state court in December
7 2009, then removed in January 2010, only to be remanded in June 2010 based on
8 Ecolab’s failure to establish the required amount in controversy. Ecolab then removed
9 the case for a second time in June 2011, but the case was again remanded in September
10 2011, because Ecolab had still not established that the amount in controversy
11 requirement was met.

12 The case was removed for a third time in October 2013, and has been pending in
13 this court since then. During the case’s stint in state court between September 2011 and
14 October 2013, the state court granted class certification, but subsequently found that
15 plaintiff Icard was not a suitable class representative. In response, plaintiffs’ counsel filed
16 a motion to substitute Matthew Ross and Robert Magee as class representatives, which
17 was granted.

18 The class certified by the state court consists of “all employees of Ecolab, who
19 are/were Route Managers or Route Sales Managers (hereafter referred to collectively as
20 ‘RSMs’), who have worked in California between December 21, 2005 and the present,
21 who do/did not cross state lines in performance of their duties, and have not received full
22 and correct pay for all hours worked and have not received accurate itemized wage
23 statements required pursuant to Labor Code section 226, and who have not fully and
24 completely released all of the claims made in this lawsuit.” See Third Amended
25 Complaint (“TAC”), ¶ 13.

26 The TAC asserts four causes of action on behalf of the class: (1) violation of
27 California Labor Code § 510, for failure to pay overtime and failure to provide meal
28 breaks, (2) violation of California Business and Professions Code § 17200, for failure to

1 pay all wages, (3) violation of California Labor Code § 226 for failure to timely provide
2 accurate wage statements, and (4) violation of California's Private Attorneys General Act.
3 Plaintiffs now move for partial summary judgment on three issues: (1) that the "outside
4 salesperson" exemption does not apply to the RSMs, (2) that the "commissioned
5 salesperson" exemption does not apply to the RSMs, and (3) that the "hazardous
6 materials" exemption does not apply to the RSMs.

7 Defendant moves for summary judgment on all asserted claims. Defendant also
8 moves for decertification of the class.

9 DISCUSSION

10 A. Motions for Summary Judgment

11 1. Legal Standard

12 A party may move for summary judgment on a "claim or defense" or "part of . . . a
13 claim or defense." Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there
14 is no genuine dispute as to any material fact and the moving party is entitled to judgment
15 as a matter of law. Id.

16 A party seeking summary judgment bears the initial burden of informing the court
17 of the basis for its motion, and of identifying those portions of the pleadings and discovery
18 responses that demonstrate the absence of a genuine issue of material fact. Celotex
19 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the
20 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
21 dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable
22 jury to return a verdict for the nonmoving party. Id.

23 Where the moving party will have the burden of proof at trial, it must affirmatively
24 demonstrate that no reasonable trier of fact could find other than for the moving party.
25 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). On an issue where
26 the nonmoving party will bear the burden of proof at trial, the moving party may carry its
27 initial burden of production by submitting admissible "evidence negating an essential
28 element of the nonmoving party's case," or by showing, "after suitable discovery," that the

1 “nonmoving party does not have enough evidence of an essential element of its claim or
2 defense to carry its ultimate burden of persuasion at trial.” Nissan Fire & Marine Ins. Co.,
3 Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105-06 (9th Cir. 2000); see also Celotex, 477
4 U.S. at 324-25 (moving party can prevail merely by pointing out to the district court that
5 there is an absence of evidence to support the nonmoving party’s case).

6 When the moving party has carried its burden, the nonmoving party must respond
7 with specific facts, supported by admissible evidence, showing a genuine issue for trial.
8 Fed. R. Civ. P. 56(c), (e). But allegedly disputed facts must be material – the existence
9 of only “some alleged factual dispute between the parties will not defeat an otherwise
10 properly supported motion for summary judgment.” Anderson, 477 U.S. at 247-48.

11 When deciding a summary judgment motion, a court must view the evidence in the
12 light most favorable to the nonmoving party and draw all justifiable inferences in its favor.
13 Id. at 255; Hunt v. City of Los Angeles, 638 F.3d 703, 709 (9th Cir. 2011). In adjudicating
14 cross-motions for summary judgment, the Ninth Circuit “evaluate[s] each motion
15 separately, giving the nonmoving party in each instance the benefit of all reasonable
16 inferences.” ACLU of Nevada v. City of Las Vegas, 466 F.3d 784, 790-91 (9th Cir. 2006)
17 (citations omitted).

18 If a party makes a showing “that there is no genuine issue of material fact as to
19 particular claim(s) or defense(s), the court may grant summary judgment in the party’s
20 favor ‘upon all or part thereof.’” Schwarzer, Tashima & Wagstaffe, Federal Civil
21 Procedure Before Trial (2008) § 14:33 (emphasis added). “This procedure is commonly
22 referred to as a ‘partial summary judgment.’” Id. § 14:34

23 2. Legal Analysis

24 As mentioned above, plaintiffs move for partial summary judgment on three
25 issues, all of which are related to Ecolab’s classification of RSMs as exempt from
26 overtime regulations. Plaintiff seek an order finding that (1) the RSMs are not subject to
27 the “outside salesperson” exemption, (2) the RSMs are not subject to the “commission
28 sales” exemption, and (3) the RSMs are not subject to the “hazardous materials” (or “haz-

1 mat") exemption. Defendant seeks an order granting summary judgment in its favor on
2 the overtime claim (based on the three exemptions), and further seeks summary
3 judgment on the remainder of the asserted claims. The court will first examine the three
4 overtime exemptions.

5 a. Outside salesperson exemption

6 The outside salesperson overtime exemption applies to employees who
7 "customarily and regularly work more than half the working time away from the
8 employer's place of business selling tangible or intangible items or obtaining orders or
9 contracts for products, services, or use of facilities." Cal. Labor Code § 1171; Wage
10 Order 5, ¶ 2(M); Wage Order 4, ¶ 2(M); Wage Order 7, ¶ 2(J).

11 There is an important difference between how federal law and state law interpret
12 the "more than half the working time" requirement of the outside salesperson exemption.
13 The federal exemption focuses on defining the employee's "primary function," asking
14 whether the employee's "chief duty or primary function is making sales." Ramirez v.
15 Yosemite Water Co., Inc., 20 Cal.4th 785, 797 (1999). If so, then the exemption applies,
16 so long as no more than 20 percent of the employee's time is spent on non-sales activity.
17 Id. The federal exemption also allows activities "incidental to sales" to be counted as
18 sales-related activity. Id.

19 In contrast, California takes a "purely quantitative approach," and focuses
20 "exclusively on whether the individual 'works more than half the working time . . . selling
21 . . . or obtaining orders or contracts.'" Ramirez, 20 Cal.4th at 797. Also, state law "does
22 not contain any provision that reclassifies intrinsically nonexempt nonsales work as
23 exempt based on the fact that it is incidental to sales." Id. (emphasis in original).
24 Instead, the "language of the state exemption only encompasses work directly involved in
25 'selling . . . items or obtaining orders or contracts.'" Id. In other words, under the
26 California exemption, the only question is whether the employee spends over 50% of his
27 or her time involved in activities directly related to sales, not including activities
28 incidentally related to sales.

1 With that standard in mind, the next step is to determine whether the outside
2 salesperson exemption applies to the RSMs. The court also notes that “the assertion of
3 an exemption from the overtime laws is considered to be an affirmative defense, and
4 therefore the employer bears the burden of proving the employee’s exemption.”
5 Ramirez, 20 Cal.4th at 794-95.

6 In their motion, plaintiffs claim that RSMs spend the majority of their work time
7 performing “hands-on duties,” such as:

8 Installing and repairing commercial dishwashers, dispensers, and related
9 equipment; performing preventative maintenance on dishwashers,
10 dispensers, and related equipment; testing the pH of the client’s water,
11 detergent levels, rinse-aid levels, and more; testing the functionality of the
12 client’s equipment; checking inventory on the client’s supply of detergent,
13 sanitizers, degreasers, and rinse-aid; talking to customers in an effort to
14 diagnose problems with their equipment; responding to emergency calls
15 from Ecolab clients when their dishwashers, dispensers, or related
16 equipment are malfunctioning; planning their day, including figuring out
17 which clients to visit each day; ordering repair parts; ordering materials to
18 perform tests on dishwashers, dispensers, and related equipment; and
19 preparing Service Detail Reports (“SDRs”).
20

21 Dkt. 74 at 3.

22 Plaintiffs also cite to 16 employee declarations containing the same list of activities
23 and claiming that more than 80% of an RSM’s non-driving work day is spent on those
24 tasks. Dkt. 74-1, Ex. 4.

25 Plaintiffs do acknowledge that RSMs spend some of their day performing “some
26 minimal sales tasks,” including upselling detergents, sanitizers, degreasers, and
27 commercial kitchen accessories; demonstrating new products and services; and taking
28 orders for goods. Dkt. 74 at 3. However, the employee declarations state that only five
to twenty percent of their workday is spent performing these sales-related tasks. Dkt.
74-1, Ex. 4.

29 Ecolab responds by arguing that “even though the customer calls involve service,
30 sales are the key.” Ecolab provides its own competing employee declarations, with one
31 RSM stating that “my primary duty is sales,” another claiming that 100% of his job duties
32

1 are related to sales, and others making similar statements about the importance of sales
2 to the RSMs' job duties. See, e.g., Dkt. 87-1, Ex. K, ¶ 3; Ex. M, ¶ 11. One of Ecolab's
3 declarants states that "there was nothing I did that did not relate to sales," and that even
4 "[b]ushing my teeth or having a cup of coffee in the morning are all related to sales."
5 Dkt. 87-1, Ex. E, ¶ 15.

6 Ecolab also emphasizes the importance that the company itself places on sales,
7 arguing that RSMs are "expected to build relationships with the customers, earn their
8 trust by familiarizing themselves with the customers' needs, and look for opportunities to
9 sell products to the customers," and pointing out that it holds monthly sales meetings with
10 RSMs and distributes sales brochures and videos to RSMs. Ecolab also notes that it
11 does not charge customers for the service visits that the RSMs provide, and instead
12 derives the majority of its income from the sales of products.

13 Ecolab provides testimony from its expert, Donald Winter, who is offered as a
14 sales expert based on his 40 years of experience as an "advisor and consultant to the
15 hospitality industries." Dkt. 87-1, Ex. NN. Mr. Winter opines that "[u]sing both qualitative
16 and quantitative methods," he has "determined that both approaches yield the ineluctable
17 conclusion that Ecolab's Route Sales Managers are primarily sales persons – and
18 further, dishwasher repair comprises but a small portion of the Route Sales Managers'
19 ongoing functions," and that the "majority of the Route Sales Managers' actual time and
20 focus is directed towards the selling function." Id., ¶ 17.

21 The divide between plaintiffs' and defendant's arguments highlights an area of
22 ambiguity in the application of the outside salesperson exemption. Plaintiffs focus on the
23 time actually spent on sales-related duties, while Ecolab also introduces arguments
24 related to how much time should be spent selling. The Ramirez court noted this
25 ambiguity, asking: "Is the number of hours worked in sales-related activities to be
26 determined by the number of hours that the employer, according to its job description or
27 its estimate, claims that the employee should be working in sales, or should it be
28 determined by the actual average hours the employee spent on sales activity?" 20

1 Cal.4th at 802 (emphasis in original).

2 The Ramirez court noted a problem with either approach – if the exemption was
3 defined solely by employer expectations, the employer could “make an employee exempt
4 from overtime laws simply by fashioning an idealized job description that had little basis
5 in reality.” 20 Cal.4th at 802. On the other hand, an employee “who is supposed to be
6 engaged in sales activities during most of his working hours and falls below the 50
7 percent mark due to his own substandard performance should not thereby be able to
8 evade a valid exemption.” Id.

9 According to the Ramirez court, the way to “steer clear of these two pitfalls” was
10 by “inquiring into the realistic requirements of the job.” 20 Cal.4th at 802 (emphasis in
11 original). To do so, the court must “first and foremost” ask “how the employee actually
12 spends his or her time,” but should also “consider whether the employee’s practice
13 diverges from the employer’s realistic expectations, whether there was any concrete
14 expression of employer displeasure over an employee’s substandard performance, and
15 whether these expressions were themselves realistic given the actual overall
16 requirements of the job.” Id.

17 The facts of Ramirez are actually strikingly similar to those in this case. The
18 plaintiffs were bottled water delivery persons, but their job title was “route sales
19 representatives.” 20 Cal.4th at 790. While plaintiffs performed such duties as delivering
20 bottled water, picking up empty bottles, refilling other supplies (cups, etc.), checking
21 bottles for leaks, and occasionally performing minor service on water coolers, the
22 defendant also expected the plaintiffs to “engage the solicitation of new customers,” and
23 said that selling “is the main job of our route salespeople.” Id. at 790-92. The defendant
24 also claimed that it expected the route sales representatives to spend 90 percent of their
25 workday selling, though later clarified to the court that the 90 percent figure included “the
26 time spent delivering bottles of water to the customer as part of the selling activity.” Id. at
27 792.

28 The Ramirez court ultimately found that the plaintiffs engaged in both sales and

1 delivery functions, and that delivery/restocking of bottles was not a “sales” function,
2 because “one who only performed these delivery tasks could not be considered a
3 salesperson.” Id. The court acknowledged that “failure to properly deliver the product
4 would lead to loss of the customer, but that does not make such delivery a sales activity,
5 any more than an attorney’s preparation of a legal brief in order to satisfy and thereby
6 retain a client is a sales activity.”¹ Id.

7 The court finds that the rationale of Ramirez applies with equal force to this case.
8 Under Ecolab’s view, everything a RSM does is related to sales, essentially arguing that
9 “failure to properly [service] the product would lead to loss of the customer.” However, as
10 in Ramirez, “that does not make such [service] a sales activity.”

11 Ecolab argues that a broader interpretation of the term “sales” is justified by the
12 Ninth Circuit’s decision in Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th
13 Cir. 2011). In Christopher, the court held that “pharmaceutical sales representatives” did
14 qualify as outside salespeople even though they did not directly sell products to doctors,
15 and instead engaged only in promotion-type activities. However, in reaching that
16 conclusion, the court emphasized the unique nature of the pharmaceutical sales industry,
17 noting that “[i]n most industries, there are no firm legal barriers that prohibit the actual
18 physical exchange of the goods offered for sale.” Id. at 396 (emphasis in original).
19 “Because such barriers do exist in this industry, the fact that [sales] commitments are
20 non-binding is irrelevant.” Id. Ecolab offers no justification for expanding Christopher’s
21 holding, which appears to apply only to sales in the context of the pharmaceutical
22 industry (or, at most, to industries in which direct sales are prohibited) to this case, in
23 which sales representatives are free to effect the “actual physical exchange of the goods

24

25 ¹ The Ramirez court also cited a previous California Court of Appeal decision, in which
26 the court found that car mechanics were not engaged in sales. Keyes Motors, Inc. v.
27 Division of Labor Standards Enforcement, 197 Cal.App.4th 557 (1987). The Keyes court
28 acknowledged that “[i]t may be true that parts and labor are ultimately sold because
mechanics diagnose the need for additional repairs,” but held that “this diagnosis and
recommendation is no more ‘salesmanship’ than a plumber’s diagnosis and
recommendation that an additional pipe is needed to make a repair.” Id. at 564. “Put
simply, a mechanic performs labor, not sales.” Id.

1 offered for sale."

2 Ecolab's overly expansive view of "sales-related activities" is reflected in its
3 expert's report. In the report, Mr. Winter includes a chart listing the various activities
4 performed by RSMs and categorizes them as "selling," "maintenance," or "repairing."
5 Dkt. 87-46, Ex. A. Interestingly, every single activity is characterized, at least in part, as
6 selling. "Syncing up for the day" is categorized as "selling," "inspect, test, and calibrate
7 machines" is categorized as "maintenance" and "selling," and "installation of dishwasher"
8 is categorized as both "repairing" and "selling," though Mr. Winter acknowledges that a
9 "relatively minor proportion is considered to be selling." Id. Most starkly, even "repairs"
10 are categorized as both "repairing" and "selling." Id.

11 It seems clear that, under Ecolab's view, literally every RSM function can be
12 considered "sales." However, as mentioned above, the Ramirez court specifically
13 rejected this expansive view of "sales-related activities."

14 By sticking to its "everything is sales" view, Ecolab fails to present the court with
15 any basis for finding that over 50 percent of the RSMs' time is spent on sales-related
16 tasks. In fact, Ecolab has not presented evidence that even one RSM spends over 50
17 percent of his or her time performing duties directly related to sales, and admitted at the
18 hearing that "no one has quantified" how the RSMs spend their time to distinguish "this is
19 sales, this is not sales." Dkt. 103 at 10. This lack of evidence is especially surprising
20 given the fact that RSMs carry tablets to complete their Service Detail Reports ("SDRs"),
21 which record the specific duties performed at each service call. Dkt. 87 at 5. However,
22 rather than citing to those records and distinguishing between activities directly related to
23 sales and those merely incidental to sales, Ecolab has opted for an all-or-nothing
24 approach, maintaining that every single RSM activity is related to sales.

25 In a similar case in this district, the court noted that the defendant required its
26 employees to "carry personal digital assistants" to "record the time they spend at each
27 store." Campanelli v. Hershey, 765 F.Supp.2d 1185, 1193 (N.D. Cal. 2011). However,
28 like the defendant in this case, the Hershey defendant failed to provide evidence of how

1 employees spent their time, on a quantitative basis, and the court granted partial
2 summary judgment in favor of plaintiff. Id. Plaintiffs emphasize the lack of any Service
3 Detail Reports, which the RSMs use to track their daily work activities, that are cited in
4 defendant's papers.

5 Overall, Ecolab has chosen not to present evidence of how much of the RSMs'
6 time was spent on strictly sales-related activities, and has instead opted to argue that all
7 of the RSMs' tasks were directed towards the ultimate goal of sales. In essence, Ecolab
8 is arguing that all of the RSMs' duties – from "synching up" and "planning for the day," to
9 "upload[ing] info at the end of the day" – are all incidental to sales. And, indeed, if the
10 federal overtime exemption were at issue in this case, Ecolab's evidence could be
11 sufficient to create a triable issue of material fact as to whether the RSMs' "primary
12 function" was sales. However, under California's exemption, Ecolab must create a triable
13 issue of material fact that the RSMs spent more than half of their day, on a purely
14 quantitative basis, directly involved in selling. As mentioned above, Ecolab has not met
15 this standard with respect to even one RSM. Instead, Ecolab appears to reject the
16 distinction between "direct sales" tasks and tasks "incidental to sales" – relying on
17 generalities such as "even though the customer calls involve service, sales are the key,"
18 or that sales are the "raison d'être of the RSM position."

19 Because Ecolab bears the burden of establishing the "outside salesperson"
20 exemption, its failure to raise a triable issue of fact as to whether the RSMs spend more
21 than 50 percent of their time on direct sales activities warrants summary judgment in
22 plaintiffs' favor. Accordingly, plaintiffs' motion for partial summary judgment is GRANTED
23 as to the "outside salesperson" exemption, and defendant's motion for summary
24 judgment is DENIED on the issue.

25 b. Commissioned salesperson exemption

26 Separate from the "outside salesperson" exemption, Ecolab also contends that the
27 RSMs are exempt from overtime laws based on the "commissioned salesperson"
28 exemption. The "commissioned salesperson" exemption applies if the employee's

1 "earnings exceed one and one-half times the minimum wage, if more than half of that
2 employee's compensation represents commissions." Wage Order 4, ¶ 3(D); Wage Order
3 7, ¶ 3(D).

4 As a threshold matter, the parties disagree over whether the RSMs are even
5 covered by a wage order which contains the "commissioned salesperson" exemption.
6 Plaintiffs contend that Wage Order 5, which does not contain the exemption, applies to
7 the class members. Wage Order 5 covers businesses in the "public housekeeping"
8 industry. Ecolab, on the other hand, argues that the class members are governed by
9 Wage Order 4 or Wage Order 7, both of which contain the "commissioned salesperson"
10 exemption. Wage Order 4 covers those employed in "professional, technical, clerical,
11 mechanical, and similar occupations," while Wage Order 7 covers the "mercantile"
12 industry.

13 Neither party has presented controlling authority for the applicability of any of the
14 three cited wage orders, so for purposes of plaintiffs' motion for partial summary
15 judgment, the court will view the evidence in the light most favorable to Ecolab and draw
16 all justifiable inferences in its favor. Accordingly, the court will proceed on the
17 assumption that Ecolab's employees are subject to either Wage Order 4 or Wage Order
18 7, both of which contain the "commissioned salesperson" exemption.

19 As mentioned above, the "commissioned salesperson" exemption applies if the
20 employee's "earnings exceed one and one-half times the minimum wage, if more than
21 half of that employee's compensation represents commissions." "Commissions" are
22 further defined as "compensation paid to any person for services rendered in the sale of
23 such employer's property or services and based proportionately upon the amount or
24 value thereof." Cal. Labor Code § 204.1.

25 In interpreting this language, the California Supreme Court cited (with apparent
26 approval) this language from a California appeals court:

27 Labor Code section 204.1 sets up two requirements, both of which must be
28 met before a compensation scheme is deemed to constitute 'commission

wages.' First, the employee must be involved principally in selling a product or service, not making the product or rendering the service. Second, the amount of their compensation must be a percent of the price of the product or service.

Ramirez, 20 Cal.4th at 803-04 (citing Keyes Motors, 197 Cal.App.3d at 563).

Plaintiffs argue that that the first prong of this test is identical to the “outside salesperson” exemption test. That is, the relevant inquiry is whether, on a quantitative basis, the employee spends more than half of his or her time directly involved in selling. The California Supreme Court’s decision in Ramirez appears to support this view – after discussing the quantitative test applicable to the “outside salesperson” exemption, the court then discusses the “commissioned salesperson” exemption, and then notes that “[a]s discussed above, it remains to be clarified on remand whether Ramirez was ‘involved principally in selling the product or service.’” 20 Cal.4th at 804. Nothing in Ramirez, nor in any other case cited by Ecolab, suggests that the federal “primary function” test should be used when applying the first prong of the “commissioned salesperson” exemption. Thus, based on the court’s earlier finding that Ecolab has not raised a triable issue of fact as to whether the RSMs spend more than half of their time selling, summary judgment would be warranted in plaintiffs’ favor on the “commissioned salesperson” exemption. However, out of an abundance of caution, the court will also analyze the second prong of the “commissioned salesperson” test – whether the RSMs’ compensation is “a percent of the price of the product or service.”

The central dispute between the parties can be traced to an ambiguity in the law, which is unclear about whether the employee's compensation must be a percent of the price of the product/service that he himself sells, or may be merely a percentage of the product price in general. The way the test is structured impliedly suggests that a salesperson's commission must be tied to his own sales – with the first prong requiring that "the employee must be involved principally in selling a product or service," and the second prong requiring that the "amount of their compensation" be "a percent of the price of the product or service" – but there is no controlling authority specifically requiring a

1 nexus between the employee's own sales and the commission paid to that employee.

2 Plaintiffs seek to impose such a requirement – in their motion for partial summary
3 judgment, they set out the “commissioned salesperson” test as follows:

4
5 (1) Plaintiffs must have spent more than one half of their total work time
6 engaged in selling a product or service, not making the product or rendering
7 the service, and (2) the purported “commissions” must have been computed
as a percent of the price of the product or services that were sold by
plaintiffs.

8 Dkt. 74 at 14 (emphasis added).

9 Plaintiffs further argue that the class members “have no control over the
10 ‘commissions’ they passively ‘earn’ from machine rental fees, excess load charges, or
11 minimum product purchase requirements under a lease contract,” and thus, “the
12 ‘commissions’ for those items are not a percent of the price of the products that were sold
13 by the RSMs.” Dkt. 74 at 14 (emphasis added). Plaintiffs then sum up the argument:
14 “The fact that most of the ostensible ‘commissions’ received by the RSMs were derived
15 from sales made by others, alone, disqualifies plaintiffs from the commission sales
16 exemption.” Id.

17 Ecolab implicitly admits that the RSMs’ commissions do not come from sales that
18 they themselves make, through the use of carefully-chosen language. Ecolab claims
19 that, a few weeks after being hired, a RSM “purchases” a territory, and then moves from
20 a salary-based income to a commission-based income, whereby the income “depends
21 almost entirely on the amount purchased by the customers he services.” Dkt. 87 at 16
22 (emphasis added). Ecolab similarly states that the commissions “are earned entirely
23 based on the sale of products” and that “the overwhelming majority of his or her
24 compensation derives from the products purchased.” Id. Notably, Ecolab is careful
25 never to say that an RSM’s commission is based on the amount of products that he/she
26 sells, it is based on the amount of products purchased by the customers that he/she
27 services. Nor does Ecolab dispute plaintiffs’ claim that “the majority of RSMs’
28 commissions come to them whether or not they ever sell a single product themselves.”

1 Neither party cites any authority, one way or the other, on the nexus needed
2 between the employee's own sales and the sales used to calculate the commission.
3 However, the court finds plaintiffs' interpretation to be more consistent with the test set
4 out in Ramirez, and with the common-sense purpose of the exemption. The idea of the
5 commissioned salesperson exemption is that, if an employee wants to work longer hours
6 in order to make more sales and increase his own pay, he should be allowed to do so,
7 without triggering overtime laws. If the employee's income was determined by something
8 other than his own sales – that is, if every employee simply received a percentage of the
9 company's overall sales – then the employee is not really receiving the fruit of his own
10 labor, so the exemption would not be justified. Moreover, defendant's view of the
11 exemption would allow employers to classify all of their employees as "commissioned
12 salespersons" simply by tying their income to the company's sales. In other words, rather
13 than paying its janitors a set salary, a company could calculate their salaries as a
14 percentage of the company's total sales, and then argue that they are commissioned
15 salespersons. Such an interpretation is at odds with the purpose of the exemption.

16 Thus, the court does find that, in order to qualify for the exemption, the employee's
17 compensation must be calculated as a percentage of the price of the products/services
18 that he himself sells. Because Ecolab has presented no evidence that RSMs'
19 commissions are based on their own sales, plaintiffs' motion for summary judgment is
20 GRANTED as to the "commissioned salesperson" exemption, and defendant's motion for
21 summary judgment is DENIED on the same issue.

22 c. Hazardous materials exemption

23 The third overtime exemption raised in plaintiffs' motion for partial summary
24 judgment is the "hazardous materials" (or "haz-mat") exemption. The haz-mat exemption
25 is found in Wage Order 4, Wage Order 5, and Wage Order 7, and provides as follows:

26 The provisions of this section are not applicable to employees whose hours
27 of service are regulated by:
28 (1) the United States Department of Transportation Code of Federal
Regulations, title 49, sections 395.1 to 395.13, regulating Hours of Service

1 of Drivers, or
2 (2) Title 13 of the California Code of Regulations, subchapter 6.5, section
3 1200 and following sections, regulating hours of drivers.

4 Wage Order 4, ¶ 3(K); Wage Order 5, ¶ 3(I); Wage Order 7, ¶ 3(K).

5 The parties focus on the second portion of that passage, and note that California
6 Code of Regulations section 1200 covers “[t]wo-axle motor trucks with a gross vehicle
7 weight rating of 26,000 pounds or less transporting hazardous materials in quantities for
8 which placards are not required.” According to Ecolab, this ends the analysis. The
9 RSMs drive trucks weighing less than 26,000 pounds, and they transport hazardous
10 materials in quantities that do not require placards – thus, they are covered by section
11 1200, and in turn, they are exempt from the overtime requirements of the applicable
wage order.

12 Plaintiffs argue that there are more requirements that must be met before the
13 RSMs can be found exempt under the haz-mat exemption. The first one, and the one
14 most heavily discussed in the briefs, is based on the idea that California’s regulations
15 apply only to people who are “drivers” by profession, not those for whom driving is
16 incidental to their profession. Plaintiffs’ main source of support for this argument is a
17 Central District of California case also involving Ecolab. See *Ladore v. Ecolab*, Case No.
18 11-cv-9386, Dkt. 65 (C.D. Cal. Jan. 22, 2013). The key passage of that opinion states
19 that “the federal and state regulations . . . address issues pertaining to those whose
20 occupation is driving rather than those who must drive to a site as an incidental function
21 to the principal duties of their occupation.” *Ladore* at 9. The *Ladore* court, in turn, cited
22 to the Division of Labor Standards Enforcement (“DLSE”) manual, which stated that the
23 exemption “only applies to employees whose regular duty is that of a driver, not any other
24 category of worker.” *Id.* (citing DLSE manual § 50.9.2.1).

25 In response, Ecolab argues that this portion of the DLSE manual has been
26 amended. Ecolab cites to a case from this court, holding that “the DLSE manual
27 changed section 50.9.2.1 to omit the statement that a driver must drive more than 50% of
28 the time.” *Wamboldt v. Safety-Kleen Systems*, 2007 WL 2409200, at *9 (Aug. 21, 2007).

1 Based on this, Ecolab repeatedly argues that Ladore is “simply wrong” and “egregiously
2 wrong,” that it “reflects the misunderstanding of Judge Feess regarding the application of
3 the exemption,” and that the changes in the DLSE manual were “ignored by the Judge in
4 Ladore.” Dkt. 87 at 21.

5 However, the portion of section 50.9.2.1 that was quoted in Ladore was not
6 affected by the amendment. In fact, even Ecolab’s declarant admits that, while portions
7 of the DLSE manual were amended in 2006, “[t]he language of section 50.9.2.1 that limits
8 the IWC exemption to only those employees whose regular duty is that of a driver, relief
9 driver, or assistant driver was left unchanged.” Dkt. 87, Ex. AAA, ¶ 22. For context,
10 section 50.9.2.1 reads as follows:

11 The IWC exemption only applies to employees whose regular duty is that of
12 a driver, not any other category of worker. The policy would cover
13 employees regularly employed as relief drivers or as assistant drivers.
14 However, any driver who does not drive or operate a truck for any period of
15 time during an entire workday is entitled to overtime premium compensation
16 for all overtime hours worked performing duties other than driving during
17 that day.

18 DLSE Policies and Interpretation Manual, section 50.9.2.1.

19 Ecolab argues that the “new” version of the DLSE manual states “that the overtime
20 exemption fails to apply only when a driver ‘does not drive or operate a truck for any

21 period of time during an entire workday.’” Dkt. 87 at 22 (emphasis added). But that
22 argument is belied by the text of the manual itself, which makes clear that an employee
23 can avoid the exemption (and thus receive overtime pay) in two ways, not just one.
24 Either (1) he can have a regular duty that is something other than driving, or (2) he can
25 not drive a truck at all in a given day, and can receive overtime pay for that day. Ecolab
26 ignores (1) and focuses only on (2). In other words, Ecolab argues that the RSMs drive a
27 truck for some period of time every day, and thus, they are not entitled to overtime pay.
28 However, the DLSE manual states that, even if an employee drives a truck every day,
they can still be entitled to overtime pay if their regular duty is not that of a driver

1 (phrased a different way, the exemption applies only if the employee's regular duty is
2 being a "driver").

3 Ecolab glosses over the first part of the DLSE definition, making no attempt to
4 argue that RSMs' regular duty is that of a driver. Instead, Ecolab limits its arguments to
5 the issue of whether the RSMs have any non-driving days. One possible reason for this
6 line of argument is that, with respect to the "outside salesperson" exemption, Ecolab has
7 argued that the primary duty of the RSMs is sales, so it would be inconsistent to now
8 argue that their primary duty is driving. Regardless of the reason, Ecolab does not even
9 attempt to raise a triable issue of fact as to whether the RSMs' regular duty is that of a
10 driver. Accordingly, because there is no triable issue of fact as to whether the RSMs'
11 regular duty is that of "drivers," the court finds that the haz-mat exemption does not apply.
12 Plaintiffs' motion for partial summary judgment on the haz-mat exemption is GRANTED,
13 and defendant's motion on the issue is DENIED.

14 The court also finds an additional basis for granting plaintiffs' motion for partial
15 summary judgment as to the haz-mat exemption. As set forth above, the exemption
16 applies to "employees whose hours of service are regulated by" the applicable California
17 regulations (section 1200 and following sections). See Wage Order 4, ¶ 3(K); Wage
18 Order 5, ¶ 3(I); Wage Order 7, ¶ 3(K) (emphasis added). Thus, in order to qualify for the
19 exemption, Ecolab must show that the RSMs' hours of service were actually regulated by
20 section 1200 and the following sections. However, Ecolab has made no attempt to do so,
21 and instead, plaintiffs point to the Ladore court's finding that Ecolab actually did not
22 comply with many of these supposedly-required regulations. For instance, (1) section
23 1212.5 imposed limits on driving time, which were not followed by Ecolab, (2) section
24 1214 required records of drivers' driving time, fatigue levels, and illness status to be kept,
25 which Ecolab did not keep, (3) section 1215 required daily reports to be kept, which
26 Ecolab did not keep, and (4) sections 1230 and 1232 required regular inspections and
27 maintenance of trucks, which Ecolab did not perform. See Ladore at 8. On the basis of
28 those findings, the court found that "Ecolab plainly wants to have its cake and eat it too."

1 Id. “To the extent that Ecolab believes the haz-mat exemption applies, it clearly feels no
2 compulsion to abide by the regulations that would be applicable.” Id. at 8-9. In other
3 words, while Ecolab argues that the RSMs are not exempt because they are subject to
4 the haz-mat regulations, the Ladore court emphasized that Ecolab makes no effort to
5 actually comply with those haz-mat regulations.

6 Similarly, in the present case, Ecolab makes no effort to show that the RSMs’
7 “hours of service” are actually regulated by “section 1200 and following sections,” and
8 instead attempts to read that language out of the wage order exemption by arguing that,
9 because the RSMs are covered by section 1200 (which governs only vehicle weight and
10 the amount of hazardous materials carried, not the drivers’ hours of service), they are
11 exempt. In other words, Ecolab would have the court read the following language – “The
12 provisions of this section are not applicable to employees whose hours of service are
13 regulated by . . . Title 13 of the California Code of Regulations, subchapter 6.5, section
14 1200 and following sections, regulating hours of drivers” – as this: “The provisions of this
15 section are not applicable to employees who are regulated by . . . Title 13 of the
16 California Code of Regulations, subchapter 6.5, section 1200.” Because it is Ecolab’s
17 burden to show that the haz-mat exemption applies, its failure to address the requirement
18 that the employees’ hours of service are regulated by section 1200 and the following
19 sections provides an additional basis for granting plaintiffs’ motion and denying Ecolab’s
20 motion on the haz-mat issue.

21 As a result of the court granting partial summary judgment in plaintiffs’ favor on all
22 three asserted overtime exemptions, defendant’s motion for summary judgment on the
23 overtime claim, as a whole, is denied.

24 d. Evidentiary objections

25 In both their opposition to Ecolab’s motion for summary judgment and their reply
26 brief in support of their own motion for partial summary judgment, plaintiffs raised a
27 number of evidentiary objections. In particular, plaintiffs claim that certain witnesses
28 were not properly disclosed under Rule 26 and that certain lay witnesses are being

1 offered as experts. Because the court finds that plaintiffs' motion must be granted, and
2 defendant's denied as to the overtime exemptions, even without excluding the challenged
3 evidence, the court finds that plaintiffs' objections are moot.

4 e. Meal breaks and other claims

5 In their complaint, plaintiffs allege that Ecolab failed to provide meal breaks to the
6 RSMs, and in its motion for summary judgment, Ecolab provides evidence of a policy that
7 required its employees to take meal breaks in accordance with California law. See Dkt.
8 78, Ex. III. Under the policy, employees are sent a "meal break reminder message" that
9 says "please ensure you take your required meal and rest breaks," and also must certify
10 that they have been provided all meal and rest breaks when they sign their timesheets.
11 Id.

12 Plaintiffs respond by arguing that the policy "did not go into effect until 2008," and
13 thus, because the class period runs from December 21, 2005 to the present, denial of
14 summary judgment is warranted.

15 At the hearing, the court sought to clarify the timing of Ecolab's meal break policy,
16 and asked defense counsel to identify which part of the evidentiary record showed that
17 Ecolab's policy was in effect during the entire class period. Counsel was given one week
18 to submit a reference to the evidentiary record.

19 In its supplemental filing, Ecolab pointed out that the first portion of the cited policy
20 (which set forth the meal break requirement, but did not have the "reminder" or the
21 certification) reflected that it was last revised in June 2007. Ecolab further cited to
22 portions of deposition testimony from its employees, many of whom testified that Ecolab
23 had a meal break policy in effect in 2005 and earlier. Finally, Ecolab pointed to the
24 deposition testimony of its "person most knowledgeable," who testified that the meal
25 break policy has existed at least since December 2005. However, Ecolab did not submit
26 the "person most knowledgeable" testimony as part of its motion for summary judgment,
27 and requests leave of court to do so now.

28 While Ecolab's decision not to include this evidence along with its motion is

1 puzzling, the court will nonetheless allow the parties an opportunity to fully address the
2 proper temporal scope of the meal break claim. Based on the current evidence, the court
3 finds that there is no evidence of any meal break violation from October 12, 2008 (the
4 earliest date for which defendant has submitted records) to the present, and thus
5 GRANTS defendant's motion for summary judgment as to the meal break claim for that
6 time period. Because there remains a triable issue of fact regarding the existence of
7 meal break violations from December 21, 2005 to October 11, 2008, the court will defer
8 its ruling until after Ecolab submits its new evidence and plaintiffs have an opportunity to
9 respond. Ecolab shall have until **October 9, 2015** to file a supplemental brief, along with
10 evidence, regarding the viability of plaintiffs' meal break claim from 2005 to 2008.
11 Plaintiffs shall then have until **October 23, 2015** to file a responsive brief. The briefs
12 shall not exceed five pages each.

13 Ecolab then argues that plaintiffs' remaining claims (specifically, the claims under
14 Cal. Bus. & Prof. Code § 17200, Cal. Labor Code § 226, and PAGA) must fail because
15 they are dependent on an unpaid wage claim. Because the court has found that
16 plaintiffs' overtime claim remains viable, so too are these claims, and thus, Ecolab's
17 motion for summary judgment is DENIED on that basis.

18 With respect to the section 226 claim, Ecolab further argues that the presence of a
19 good-faith dispute precludes a finding that any violation was "knowing and intentional,"
20 and further argues that plaintiffs suffered no harm from any alleged violation. First,
21 Ecolab's argument regarding the "good-faith dispute" is completely conclusory, as it
22 consists of only a one-line argument without any support for such a finding. Ecolab's
23 motion is DENIED on that basis.

24 Second, as to harm, plaintiffs allege that they suffered harm "in not receiving their
25 overtime wages based on actual hours worked," creating a "substantial risk that without
26 accurate wage stubs the plaintiffs will continue not to be paid their overtime wages in
27 accordance with the law." That alone distinguishes this case from the non-precedential
28 case cited by Ecolab, in which the Ninth Circuit noted that the plaintiff "conceded in his

1 deposition that he experienced no harm as a result of his employer's alleged violations of
2 section 226(a), and that the alleged violations had no consequences." Villacres v. ABM
3 Industries Inc., 384 Fed. Appx. 626, 627 (9th Cir. 2010). Accordingly, Ecolab's motion is
4 also DENIED on that basis.

5 B. Motion for Decertification

6 1. Legal Standard

7 The court may, at its discretion, decertify a class if the requirements of Federal
8 Rule of Civil Procedure 23 are not satisfied. See, e.g., O'Connor v. Boeing North
9 American, Inc., 197 F.R.D. 404, 409–10 (C.D.Cal. 2000). The standards used for
10 determination of class certification, contained in Rule 23 of the Federal Rules of Civil
11 Procedure, are applied in determining whether to decertify a class. O'Connor, 197 F.R.D.
12 at 410.

13 Rule 23(a) requires that plaintiffs demonstrate numerosity, commonality, typicality
14 and adequacy of representation in order to maintain a class. Mazza v. American Honda
15 Motor Co., 666 F.3d 581, 588 (9th Cir. 2012). That is, the class must be so numerous
16 that joinder of all members individually is "impracticable;" there must be questions of law
17 or fact common to the class; the claims or defenses of the class representative must be
18 typical of the claims or defenses of the class; and the class representative must be able
19 to protect fairly and adequately the interests of all members of the class. See Fed. R.
20 Civ. P. 23(a)(1)-(4).

21 If the class is ascertainable and all four prerequisites of Rule 23(a) are satisfied,
22 the court must also find that the plaintiff has "satisf[ied] through evidentiary proof" at least
23 one of the three subsections of Rule 23(b). Comcast Corp. v. Behrend, 133 S.Ct. 1426,
24 1432 (2013). A class may be certified under Rule 23(b)(1) upon a showing that there is a
25 risk of substantial prejudice or inconsistent adjudications from separate actions. Fed. R.
26 Civ. P. 23(b)(1). A class may be certified under Rule 23(b)(2) if "the party opposing the
27 class has acted or refused to act on grounds that apply generally to the class, so that
28 final injunctive relief or corresponding declaratory relief is appropriate respecting the

1 class as a whole." Fed. R. Civ. P. 23(b)(2). Finally, a class may be certified under Rule
2 23(b)(3) if a court finds that "questions of law or fact common to class members
3 predominate over any questions affecting only individual members, and that a class
4 action is superior to other available methods for fairly and efficiently adjudicating the
5 controversy." Fed. R. Civ. P. 23(b)(3).

6 2. Legal Analysis

7 Ecolab's primary challenge to certification is on the "predominance" prong of Rule
8 23(b)(3), although its motion also purports to challenge the commonality, typicality,
9 adequacy, and superiority prongs.

10 In its motion, Ecolab first addresses predominance and commonality together,
11 noting that the commonality analysis is "subsumed" by the predominance analysis. With
12 regard to the overtime claim, Ecolab argues that individual issues predominate as to each
13 of the three asserted overtime exemptions. First, as to the sales exemptions, Ecolab
14 argues that different RSMs may spend more or less than 50% of their time performing
15 sales activities, and that "many RSMs think their business is all sales, all the time, and
16 describe the 'service' part of the job as minimal," while others may minimize the sales
17 aspect of the job.

18 As an initial matter, having granted plaintiffs' motion for partial summary judgment
19 on both sales-related exemptions, the presence or absence of individual issues is now
20 moot. Regardless, even if the court had not granted plaintiffs' motion, the court finds that
21 Ecolab's argument depends on the same re-casting of all duties as sales-related that has
22 been rejected by the California Supreme Court. Ecolab relies on evidence regarding the
23 subjective belief of its employees, showing that they have adopted the "all sales, all the
24 time" viewpoint that was rejected in Ramirez. Ecolab appears to suggest that, if enough
25 employees simply believe that they are salespeople, that is sufficient for individual issues
26 to predominate over common ones. The court rejects that argument. Employees'
27 subjective beliefs are irrelevant to the application of the sales-related overtime
28 exemptions. If Ecolab had instead presented evidence that at least some of the RSMs

1 actually spent more than 50% of their time performing tasks directly related to sales, that
2 would affect the predominance analysis. However, as noted above in the context of the
3 summary judgment motions, Ecolab has failed to present evidence that even one RSM
4 spent more than 50% of his or her time, on a purely quantitative basis, involved in sales.
5 In other words, while Ecolab is correct that “variations among employees are material to
6 deciding” whether the employees are exempt, those variations must go to the time spent
7 on sales tasks. Simply showing variations in employees’ subjective beliefs about the
8 importance of sales is not sufficient.

9 Ecolab then makes a separate argument applicable to only the commissioned
10 salesperson exemption, arguing that some RSMs may not earn more than 1.5 times the
11 minimum wage for every hour during weeks in which they worked over 40 hours, as
12 required to trigger the exemption. Again, having found that the commissioned
13 salesperson exemption does not apply, the presence or absence of individual issues is
14 now irrelevant. In addition, on the merits, Ecolab has presented no evidence showing
15 that certain RSMs earn above the required income threshold while some do not. Instead,
16 Ecolab relies on speculation that some of the RSMs may fall below the threshold, making
17 it possible that individual issues would predominate. Such speculation is not sufficient to
18 warrant decertification. Moreover, Ecolab has not presented evidence that any single
19 RSM receives commissions based on his or her own sales, further demonstrating that
20 any individual issues regarding the “1.5 times the minimum wage” prong are speculative.

21 With regard to the haz-mat exemption, Ecolab argues that different RSMs may
22 carry different amounts of the hazardous materials on different days. Even if true, the
23 court has previously found that the haz-mat exemption does not apply to any of the
24 RSMs, because their regular duty is not that of drivers and because the drivers’ hours of
25 service are not actually regulated. Thus, the amount of materials carried by the RSMs is
26 irrelevant.

27 Apart from the overtime claims, Ecolab argues that individual inquiries
28 predominate regarding the meal break claim and derivative claims. Taking the derivative

1 claims first, to the extent that they are derivative of the overtime claim, the court finds that
2 common issues do predominate over individual ones, for the same reasons described
3 above.

4 With regard to the meal break claim, the court will re-assess the predominance
5 analysis after the parties have submitted their supplemental evidence and briefing.

6 Next, Ecolab argues that the proposed class representatives are not typical of the
7 class, because other RSMs have submitted declarations stating that they spend the
8 majority of their time selling. Again, Ecolab is placing far too much emphasis on the
9 subjective beliefs of its employees, which is irrelevant to the “purely quantitative” analysis
10 required under California law. Given that Ecolab has not presented any evidence
11 showing that the proposed class representatives are atypical in terms of how they
12 actually spend their time while working, the court finds no basis on which to decertify the
13 class based on lack of typicality.

14 Ecolab then argues that the proposed class representatives are not adequate.
15 Specifically, Ecolab argues that Ross is not adequate because he is a former employee
16 and thus lacks standing to seek injunctive relief, and argues that Magee is not adequate
17 because he works as a SSRM (a Sales Service Route Manager), not a RSM (Route
18 Sales Manager), and thus falls outside of the class definition.

19 With respect to Ross, the court finds no reason why he, even as a former
20 employee, would not have standing to pursue claims for damages; and moreover, courts
21 in this district have found that “not only are former employees adequate representatives
22 of current employees in class actions seeking at least in part declaratory and/or injunctive
23 relief, but ... former employees provide superior representation in bringing claims against
24 the employer.” See, e.g., Mendez v. R+L Carriers, Inc., 2012 WL 5868973 (Nov. 19,
25 2012); Krzesniak v. Cendant Corp., 2007 WL 1795703 (June 20, 2007).

26 As to Magee, it appears undisputed that he works as a SSRM rather than as a
27 RSM. Plaintiffs contend that this is a distinction without a difference, as SSRMs perform
28 the same functions as RSMs, the only difference being that they are assigned to work in

1 a different division of Ecolab, referred to as the “PureForce” division. Plaintiffs also
2 emphasize that, after the class was certified in state court, Magee (and the other SSRMs)
3 were included on the notice list provided by Ecolab to the notice administrator.

4 If the latter is true, plaintiffs may have an argument that Ecolab is estopped from
5 arguing that the SSRMs should not be in the class. However, as it stands now, the
6 SSRMs are not within the definition of the class that was actually certified, which includes
7 only employees “who are/were Route Managers or Route Sales Managers.” If plaintiffs
8 wish to amend the class definition to include Sales Service Route Managers, they may
9 move to do so, but the court will not expand the class definition on its own. Thus, based
10 on the current class definition, the court finds that Magee is not an adequate class
11 representative. However, because the court finds that Ross is an adequate class
12 representative, Magee’s lack of adequacy does not provide a basis for granting Ecolab’s
13 motion for decertification.

14 Ecolab makes one other argument as to adequacy, but it is simply a rehash of
15 their sales-related argument that has been repeatedly rejected throughout this order. In
16 short, Ecolab argues that Ross and Magee are not adequate class representatives
17 because they are “antagonistic to the RSM group, many of whom love selling full-time
18 and do not want their classification to change.” Whether some class members do indeed
19 “love selling” is entirely irrelevant to the claims at issue, and does not affect the Rule 23
20 analysis whatsoever.

21 Ecolab then challenges the superiority of a class action as a means of litigating
22 this case, although its arguments appear to be reiterations of its predominance and
23 adequacy arguments. Specifically, Ecolab argues that “the lack of common evidence”
24 would make trial unmanageable, and that “RSMs have their own collection of
25 experiences, most of which are markedly different from those alleged by Ross/Magee.”
26 Having already ruled on Ecolab’s arguments regarding predominance and adequacy, the
27 court finds no new issues to be raised by these arguments, and finds that the superiority
28 requirement is met.

Finally, after Ecolab's reply was filed, plaintiffs filed evidentiary objections, and in response to the objections, Ecolab filed a motion to strike, arguing that the so-called objections actually constituted an impermissible sur-reply, because the filing contained substantive arguments on the motion. While the court agrees that the objections straddle the line between objections and argument, they do not constitute an improper sur-reply, and the court denies the motion to strike.

CONCLUSION

8 Based on the foregoing reasons, plaintiffs' motion for partial summary judgment is
9 GRANTED; Ecolab's motion for summary judgment is DENIED with the exception of the
10 meal break claim, for which summary judgment is GRANTED for the time period from
11 October 12, 2008 to the present and DEFERRED for the time period from December 21,
12 2005 to October 11, 2008; and Ecolab's motion for decertification is DENIED, with the
13 exception of the meal break claim, for which a decision on decertification is DEFERRED.

IT IS SO ORDERED.

16 || Dated: September 28, 2015

PJZ

PHYLLIS J. HAMILTON
United States District Judge